044

DOCKET FILE COPY ORIGINAL ORIGINAL

RECEIVED

APR 5 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local	)	
Competition Provisions of the	)	CC Docket 96-98
Telecommunications Act of 1996	)	
	)	

JOINT COMMENTS OF CBEYOND COMMUNICATIONS, INC., E.SPIRE COMMUNICATIONS, INC., KMC TELECOM, NET2000 COMMUNICATIONS SERVICES, INC., WINSTAR COMMUNICATIONS, INC. AND XO COMMUNICATIONS, INC.

Brad E. Mutschelknaus
Jonathan E. Canis
Ross A. Buntrock
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600
(202) 955-9782 (fax)
rbuntrock@kelleydrye.com

Attorneys for the Joint Commenters

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local	)	
Competition Provisions of the	)	CC Docket 96-98
Telecommunications Act of 1996	)	
	)	

JOINT COMMENTS OF
CBEYOND COMMUNICATIONS, INC., E.SPIRE COMMUNICATIONS, INC., KMC TELECOM, NET2000 COMMUNICATIONS SERVICES, INC., WINSTAR COMMUNICATIONS, INC. AND XO COMMUNICATIONS, INC.

Cbeyond Communications, Inc., e.spire Communications, Inc., KMC Telecom, Net2000 Communications Services, Inc. ("Net2000"), Winstar Communications, Inc. ("Winstar"), and XO Communications, Inc. ("XO") (collectively, the "Joint Commenters"), by their attorneys, submit these comments in response to the Commission's Public Notice requesting comment on the use of unbundled network elements to provide exchange access service.[1] The Joint Commenters represent the interests of a wide range of facilities-based CLECs utilizing innovative technologies to provide integrated packages of voice and broadband data services, including dedicated access, local, and long distance, and advanced data services, such as frame relay, asynchronous transfer mode ("ATM") and digital subscriber line ("DSL") services.

---

[1] *See Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, Public Notice, DA 01-169 (rel. Jan. 24, 2001) ("*Public Notice*"). *See also Common Carrier Bureau Grants Motion for Limited Extension of Time for Filing Comments and Reply Comments on the Use of Unbundled*

I. SUMMARY

In these Comments, the Joint Commenters submit that the Commission must afford all CLECs, including CLECs deploying data-oriented networks, the tools they need to obtain enhanced extended links ("EELs") in a timely and cost-effective manner. In order for CLECs to make effective use of EELs to deploy competitive services and technologies, the Commission must eliminate widespread delays and restrictions that have plagued EEL conversions, and to date made EELs the equivalent of "vaporware."

To that end, the Joint Commenters submit that: (1) the Commission must make crystal clear that ILECs may not refuse to provision an EEL based on pre-audits of CLECs who have self-certified that a special access circuit is eligible for an EEL conversion, and should specifically find that an ILEC that engages in a pre-audit of such circuits is acting unjustly and unreasonably in violation Section 201(b) of the Act and ¶ 30 of the *Supplemental Order Clarification*; (2) the Commission should clarify that the Commission's orders permit CLECs to convert high capacity special access services to EELs, even if the interoffice portion of the circuit continues to carry special access traffic, and find that ILECs may not force CLECs to maintain segregated and duplicative circuits for EELs and special access; (3) the Commission should enact nationwide EEL provisioning intervals; and (4) the Commission should ensure that EELs are available for carriers with data oriented networks, and that any restrictions imposed upon EELs to address the Commission's concerns regarding special access arbitrage are

---

Network Elements to Provide Exchange Access Service, CC Docket No. 96-98, Public Notice, DA 01-501 (rel. Feb. 23, 2001).

narrowly drawn to restrict the use of EELs only when they are utilized to carry interexchange circuit switched voice traffic.

It is critical to the success of local competition that CLECs—be they providers of voice and/or data services—have ready access to EELs at forward-looking incremental cost pricing. By taking the steps outlined herein, the Commission will go a long way in ensuring the success of local competition in all market segments.

II. DUE TO ILEC INTRANSIGENCE AND FOOT-DRAGGING, OVER A YEAR AND A HALF AFTER THE COMMISSION FIRST MANDATED EELS, ONLY A HANDFUL OF EELS HAVE ACTUALLY BEEN PROVISIONED

The Commission's rules, including the *UNE Remand Order*[2] currently provide requesting carriers with a mostly theoretical ability to obtain enhanced extended links ("EELs"), which consist of an existing combination of an unbundled loop, multiplexing/concentration, and dedicated transport elements, on an unrestricted basis at network element prices. Subsequent to the release of the *UNE Remand Order*, the Commission adopted the *Supplemental Order* and *Supplemental Order Clarification*, which sought to clarify the rules governing the conversion of special access circuits to combinations of UNEs to the extent that a CLEC provides a significant amount of local exchange service.[3]

In the *UNE Remand Order*, the Commission concluded that "requesting carriers and incumbent LECs have developed routine provisioning processes to deploy the EEL using the

---

2 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order,*" issued in response to *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)), *modified by* Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) ("*Supplemental Order*").

3 *See Supplemental Order*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

ASR or Access Service Request process, and thus requesting carriers will not face material provisioning delays and costs to integrate the EEL into their networks."[4] In its *Supplemental Order Clarification*, the Commission expanded upon the requirement that the EEL be made available using the ASR process, mandating that upon receipt of a properly self-certified request, the ILEC must *immediately process the conversion*, and that the conversion *should be simple and accomplished without delay.*"[5] In particular, the *Supplemental Order Clarification* permits requesting carriers to self-certify that they are providing a "significant amount of local exchange service" to the particular customers served by the circuit.[6] The Commission defined three local usage options as a "safe harbor for determining the minimum amount of local exchange service that a requesting carrier must provide in order for it to be deemed significant," on a particular special access circuit—and therefore eligible to be converted to EEL pricing.[7]

The *Supplemental Order Clarification* made abundantly clear that ILECs must allow CLECs to self-certify the eligibility of particular circuits for EEL conversion. The *Supplemental Order Clarification* warns that an ILEC may not require a requesting carrier to submit to an audit prior to provisioning the requested EEL circuits. Nonetheless, despite the Commission's clear admonitions, ILECs so far have refused to accept the self-certifications of CLECs placing orders for EEL conversions, and have generally dragged their feet in establishing processes to effectuate the Commission's orders and quickly convert eligible EEL circuits.

---

4 *UNE Remand Order*, n. 581.

5 *Supplemental Order Clarification*, ¶ 30 (emphasis added).

6 *Id.*

7 *Id.*

The rationale of the restrictions now governing EELs had its genesis in ILECs' purported concerns regarding the loss of special access revenues, accompanying rate shock, and loss of Universal Service support that would result if IXCs were immediately provided unrestricted access to EELs to transport their interexchange switched voice traffic. In adopting the *Supplemental Order* and *Supplemental Order Clarification*, the Commission attempted to accommodate the ILECs' concerns, in large part because the ILECs promised that once safeguards were in place they would readily convert special access facilities to EEL circuits for CLECs. But despite their words of comfort, ILECs have not lived up to their promises to provide CLECs with timely and cost-effective EEL conversions.

Indeed, Southwestern Bell Telephone Company ("SWBT") took *no real steps* to implement the Commission's EEL ordering requirements until December 27, 2000, 13 months after the release of the Commission's *UNE Remand Order*. e.spire sought (and received permission) to litigate the issue in the Commission's Accelerated Complaint Docket of whether SWBT's EEL conversion process was unjust and unreasonable in violation of 201(b) of the Act, and whether SWBT's processes for converting special access circuits to EELs was "simple" and could be "accomplished without delay." Only after e.spire filed comments opposing SWBT's 271 application for Kansas and Oklahoma did SWBT modify its EEL conversion policy.[8] Even after SWBT modified its policy, its efficacy in accomplishing simple and easy EEL conversions remains unclear. Similarly, Verizon (f/k/a Bell Atlantic and GTE) has also refused to accept the self-certifications of carriers, instead preferring to litigate the issue of both whether EELs should

[8] *See* Letter Geoffrey M. Klineberg to Magalie Roman Salas, CC Docket No. 00-217 (Dec. 27, 2000) (*Ex parte presentation* detailing SWBT's modified policy and process for

be provided at all,[9] and whether Verizon is authorized to refuse to provision EELs pending completion of pre-audits of EEL orders in contravention of the clear terms of the Commission's orders.[10]

The Joint Commenters submit that it is essential that the Commission afford the CLECs the tools they need to obtain EELs in a timely and cost-effective manner. ILECs cannot be allowed to hamstring EEL deployment by pre-auditing the circuits that CLECs seek to convert to EEL pricing, or to establish "pre-audit" or other criteria that are inconsistent with the standards adopted by Commission.

III. THE COMMISSION SHOULD MAKE CLEAR THAT ILECS MAY NOT UNDERTAKE PRE-AUDITS OF CLECS THAT HAVE SELF CERTIFIED EEL ELIGIBILITY, AND SHOULD CLARIFY THAT UNDER THE COMMISSION'S RULES CLECS ARE ALLOWED TO CONVERT CIRCUITS TO EELS ON A DS1-BY-DS1 BASIS

The Commission's *Supplemental Order Clarification* clearly states that "LECs must allow requesting carriers to *self-certify* that they are providing a significant amount of local exchange service over combinations of unbundled network elements." Further, the *Supplemental Order Clarification* states that "[w]hen a loop-transport combination includes multiplexing (e.g. DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet this criteria."[11] A plain reading of the Commission's EEL rules makes clear that CLEC are allowed to convert

---

converting special access circuits to EELs in response to comments filed by e.spire) ("*SWBT EEL Conversion Ex Parte*").

9 *See Bell Atlantic Petition for Reconsideration and Clarification*, CC Docket 96-98 at 5 (filed Feb. 17, 2000) (wherein Bell Atlantic argued that the Commission's requirement that ILECs provide EEL violates Rule 315(c) as interpreted by the Eighth Circuit in *Iowa Util. Bd. V. FCC*).

10 *See Net2000 Communications Services, Inc. v. Verizon-Washington, D.C., Inc. et. al*, File No. EB-00-MD-018 (filed Nov. 1, 2000).

11 *Supplemental Order Clarification*, 15 FCC Rcd at 9603, ¶ 22.

circuits to an EELs on a DS1-by-DS1 basis. Nonetheless, ILECs continue to ignore CLECs self-certifications that such DS1 circuits are eligible for conversion, and insist that each and every channel on a carrier's multiplexed high capacity interoffice transport circuit meet one of the safe harbors set forth in the *Supplemental Order Clarification*.

The Commission should state emphatically that ILECs may not establish "pre-audit" or other criteria that are inconsistent with, or more burdensome than, the Commission's requirement that a letter self-certifying that a carrier meets the "significantly local standard" is sufficient. The Joint Commenters submit that ILECs must not be allowed to be the arbiters of the "significantly local" determination—rather, that authority remains with the Commission. Until such time as the regulatory authority concludes that the CLEC's services do not satisfy the "significantly local" standard, the CLEC's self-certification must prevail. Furthermore, the Commission must clarify that, contrary to the arguments of ILECs, the presence, or lack thereof, of ancillary DS1 channels on the interoffice component of a circuit, or the presence of any other tariffed service (such as tariffed multiplexing) does not affect a CLEC's ability to convert a particular EEL-eligible DS1 circuit to an EEL arrangement.

A. The Commission Must Make Clear that Enforcement of the "Significantly Local" Requirement of the Commission's Rules Rests with the Commission and NOT the ILEC; Accordingly the Commission Should Order ILECs to Desist in Conducting Pre-Audits of CLEC Circuits.

The Commission's EEL orders unequivocally allow carriers to *self-certify* their eligibility for EEL conversions by indicating to the ILEC that the CLEC provides a "significant amount of local exchange service."[12] Although the Commission did not prescribe a specific

[12] *See Supplemental Order*, 15 FCC Rcd 1762 at ¶ 5; *see also Supplemental Order Clarification*, 15 FCC Rcd 9598 at ¶ 21. The Commission warned it would take swift

form in which a requesting carrier must make this certification, they agreed that "a letter sent to the incumbent LEC by a requesting carrier is a practical method of certification."[13] The Commission's *Supplemental Order Clarification* specifically emphasizes that "the incumbent LEC may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements."[14] To date, however, ILECs, in direct contravention of the Commission's orders, have ignored the self-certifications of CLECs and effectively appointed themselves the arbiters and interpreters of the Commission's rules whose self-appointed duties include undertaking pre-audits of circuits that CLECs have certified comply with the Commission's rules and requested be converted to EELs.

For example, beginning in March 2000, Net2000 submitted four letters certifying that it met the required local traffic thresholds as defined by the *Supplemental Order* and *Supplemental Order Clarification* and requesting conversion of special access circuits to EELs.[15] However, Verizon has violated the EEL orders by refusing to implement *any* of the requests. Similarly, in e.spire's experience, Qwest has conducted pre-audits of e.spire's EEL conversion requests, and looked to e.spire's multiplexed DS3 in determining whether a "significant amount of local exchange service" exists under tests laid out in the Su*pplemental Order Clarification.* Based on this misreading, Qwest has unilaterally rejected virtually all of the circuits e.spire requested for conversion.

---

enforcement action against any ILEC that unreasonably delays a requested conversion; *see Supplemental Order* at n.9.

13 *Id.* at 9602-9603, ¶ 29.

14 *See Supplemental Order Clarification*, 15 FCC Rcd at 9603, ¶ 31.

15 *See Net2000 Communications Services, Inc. v. Verizon-Washington, D.C., Inc. et. al*, File No. EB-00-MD-018 Initial Brief Exhibit 1 (filed March 22, 2001).

The Commission's *Supplemental Order Clarification* prescribes the express terms under which an incumbent LEC may conduct an audit of local traffic flows. The Commission emphasized specifically that "the incumbent LEC may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements."[16] As described above, ILECs have engaged in the exact type of unreasonable and unjust behavior the Commission warned against in its EEL orders.[17] In conducting their illegal pre-audits, the ILECs conclude, as described above, that the DS1s sought to be converted to do not meet the ILEC's own interpretation of the Commission's EEL orders. Both the conduct of the pre-audit by the ILEC and the misapprehension of the Commission's EEL orders are in direct conflict with terms of the orders and prohibitions contained within the Commission's rules.

Accordingly, the Joint Commenters urge the Commission to clarify in no uncertain terms that ILECs may not engage in illegal pre-audits, and that contrary to the arguments of ILECs, the presence, or lack thereof, of ancillary DS1 channels on the interoffice component of a circuit, or the presence of any other tariffed service, does not affect a CLEC's ability to convert a particular DS1 circuit to an EEL arrangement.

B. The Commission Should Clarify That ILEC Demands That Each DS1 On A DS3 Circuit (Or Other Tariffed Service) Meet The 'Significantly Local' Test Constitutes Prohibited Segregation Of Trafffic

Carriers currently using high capacity transport (special access) are being precluded from converting circuits to EELs in direct contravention of the Commission's *UNE Remand Order*, the *Supplemental Order* and the *Supplemental Clarification Order,* which

---

16 *Supplemental Order Clarification*, 15 FCC Rcd at 9603, ¶ 31.

recognize that currently combined loop and transport elements constitute network elements that a requesting carrier may obtain at unbundled network element prices.[18] The result is that carriers are being required by ILECs to maintain two circuits; one for EELs and one for access traffic.

The *Supplemental Order* reaffirmed that if a requesting carrier provided a significant amount of local exchange service to a particular customer, a carrier could receive UNE pricing for the network elements.[19] Similarly, all three of the options in the *Supplemental Order Clarification* apply on an end-user-by end-user basis. For example, in safe harbor option number one, the Commission states that "the requesting carrier certifies that it is the exclusive provider of an *end user's* local exchange service."[20] Option number two asks whether the "requesting carrier certifies that it provides local exchange and exchange access services to an *end user customer's premises* and handles at least one third of the user customer's local traffic. . . ."[21] Option number three discusses whether a requesting carrier provides a specific percentage of the "*end user's*" local service.[22] The central question is, for the particular end user involved, whether the CLEC is providing the requisite amount of local traffic specified in the relevant option.

---

17 *Id.*; *see also Supplemental Order* (stating that the Commission will take swift enforcement action if the Commission becomes aware of any LEC unreasonably delaying the ability of a requesting carrier to make such conversions).

18 *See UNE Remand Order*, 15 FCC Rcd 3696, 3912, ¶ 486; *Supplemental Order*, 15 FCC Rcd at 1760-1761, ¶ 3; *Supplemental Order Clarification*, 15 FCC Rcd at 9587-90, ¶¶ 2-5.

19 *See Supplemental Order*, 15 FCC Rcd at 1760-1761, ¶ 4.

20 *Supplemental Order Clarification*, 15 FCC Rcd at 9598, ¶ 22 (*citing Supplemental Order* at n. 9).

21 *Supplemental Order Clarification*, 15 FCC Rcd at 9597-98, ¶22.

22 *Id.*

Based on a plain reading of all three safe-harbors, EEL eligibility is to be judged based on the services provided to that particular end user (*i.e.*, based on facilities dedicated to the end user in question). The only way to do this logically is on a DS1 circuit-by-DS1 circuit basis, as only DS1 circuits are dedicated to particular end users, and this fact is reflected in the construction of the Commission's safe-harbor options. For example, the *Supplemental Order Clarification* determined that under safe harbor options two and three, when a loop transport combination includes DS1 circuit to DS3 circuit multiplexing then "each of the individual DS1 circuits must meet this criteria. . ."[23] The Commission goes on to explain that "[t]he active channels on any loop-transport combination, and the entire facility, must carry the amount of local traffic specified."[24] Given the context in which it arises (i.e., the designation of local traffic thresholds for converted DS1 circuits), the only reasonable construction of this language is that it applies to each DS1 *requested to be converted to an EEL*. That is, for each of the DS1 circuits that will be converted to EEL, a majority of the active channels on that DS1 must satisfy the 50 percent local voice traffic test, while the entire DS1 circuit must meet the local voice traffic test. What is done with the remainder of the DS3 circuit on which these DS1s ride is simply irrelevant.

In support of the position that option number 2 and 3 simply require that each individual DS1 circuit *requested to be converted to EELs* meet the Commission's local usage criteria, it is instructive to note the associated statement under safe harbor option number one, which provides that the "carrier can then use the loop-transport combinations that serve the end

---

23 *Id.*

24 *Id.*

user to carry any type of traffic, including using them to carry 100 percent interstate access traffic." Under option one, the Commission has allowed DS1 circuits to be converted to EELs even though in this instance the circuit as a whole may not meet the local usage thresholds, because the CLEC certifies that it is the exclusive provider of an end user's local exchange service.

The Joint Commenters do not claim that an entire DS3 circuit (or any other tariffed product) should be converted to EEL, or UNE, pricing. Rather, only that portion of the DS3 circuit that includes EEL-eligible DS1 circuits should be subject to UNE pricing. ILECs are well aware of the practice of "ratcheting" and are able to impose different rates for dissimilar types of traffic (such as switched and special access) sent over the same DS3 circuit. ILEC objections based on the status of the multiplexed DS3 circuit are misplaced, and their application to CLECs while the ILECs utilize a similar type of architecture is discriminatory. Accordingly, the Commission should make a specific finding that CLECs are entitled to "ratchet" between special access and UNEs in the same way that ILECs currently ratchet between special access and switched access services.

First, it is clearly inappropriate to suggest that the "significantly local" test applies to an entire DS3 transport circuit as a whole. As discussed previously, the Commission's EEL orders direct CLECs and ILECs to apply the traffic tests to *each* DS1 circuit associated with an end user customer. In fact, the DS3 circuit is not dedicated to any particular end user and, therefore, it makes no sense to identify "the end user's" local traffic on the circuit. It would make no sense, and the Commission's orders do not contemplate, that an *entire* DS3 circuit will

serve one end user customer, because the very nature of a DS3 channelized circuit is to serve multiple end users.

Further, in refusing to convert DS1 circuits multiplexed to DS3s that meet one of the three safe-harbors, ILECs incorrectly rely upon a purported prohibition on co-mingling contained in the *Supplemental Order Clarification*. However, this reliance is misplaced. Notably, none of the three safe harbor options uses the term "co-mingling." Instead, each test prohibits only the *connection* of an EEL to a *tariffed service*. "Co-mingling" is referenced only in paragraph 28, which defines this term as "combining" loops or loop-transport combinations with tariffed special access services.[25] In issuing the *Supplemental Order Clarification*, the Commission noted that, based on the record at that time, it was not persuaded that the elimination of the prohibition on "co-mingling" would not lead to the use of unbundled network elements by interexchange carriers solely or primarily to bypass special access services.[26] The Joint Commenters submit, however, that the Commission should clarify that requesting carriers may provide services, *including data services*, over a DS1 circuit converted to an EEL.

Accordingly, the Commission's prohibition on co-mingling applies only to the connection of converted circuits to tariffed services and not to the provisioning of EEL-eligible circuits over the same facilities also used to support additional services. Any other interpretation would render the Commission's option to convert multiplexed circuits at non-collocated arrangements meaningless, since a carrier would be forced to convert *each* and *every* DS1 circuit riding a DS3 circuit or other tariffed service in every instance.

---

25 *Id.*

26 *See Supplemental Order Clarification,* 15 FCC Rcd at 9602 at ¶ 28.

C. The Purchase of Separate and Underutilized DS3 Circuits for EEL-Eligible DS1s is Inefficient and Illogical

If the Commission were to ratify the ILEC position that an entire DS3 must meet the Commission's safe harbors, the effect would be to require CLECs to re-configure their networks, and expend significant amounts of additional time, resources, and money, simply to satisfy a regulatory, rather than an operational network requirement. This inefficient network segregation would, in practical effect, require CLECs to construct twice the number of UNEs, lease twice the number of multiplexers, incur twice the amount of non-recurring and recurring charges for channel terminations, and configure twice the number of channel termination points, in effect forcing carriers to operate two distinct overlapping networks. At bottom, these inefficiencies are the sole reason why ILECs seek to force CLECs to segregate traffic by purchasing additional transport circuits.

The Joint Commenters submit that the Commission must clarify that a DS1 circuit is eligible for conversion to an EEL while riding on a DS3 circuit with other types of ancillary traffic. Such an interpretation not only complies with the local traffic restrictions, as outlined by the Commission in the *UNE Remand Order*, the *Supplemental Order*, and the *Supplemental Clarification Order*, but fully realizes the purpose behind making the EEL available, and avoids the redundancy of network construction while increasing overall network efficiencies.

Endorsement of the ILEC-imposed regulatory distinction would ultimately benefit only the ILECs, and increase the overall costs for CLECs to compete in the local services market. Such an action is contrary to the Commission's underlying rationale for requiring ILECs to make EEL pricing available to CLECs in the first instance, and would effectively foreclose conversion of special access circuits to EELs for all CLECs. The ultimate result would be for

CLECs to create an entire duplicate "UNE-only" network that would exist parallel to, but separate from, a non-UNE network.

D. The Commission Should Establish National EEL Provisioning Intervals

Besides engaging in illegal pre-audits and acting as enforcers of their own misguided interpretations of the Commission's EEL rules, ILECs have generally delayed the deployment of EELs. These delays have already resulted in massive damages to CLECs, both in financial terms and in terms of operating efficiency. Indeed, CLECs fearful of losing customers due to ILEC refusal to adhere to the Commission's EEL rules have been burdened with overcharges incurred as a result of having to pay for loop transport combinations at the higher special access rates rather than at the appropriate lower UNE rates for EELs. CLECs are often forced to order special access circuits pursuant to a more costly month-to-month term with the hope and expectation that ILECs will soon convert the special access circuits to EELs.

Currently ILECs have no obligation to provide EELs, either new EEL or special access circuits converted EELs converted, by a date certain, despite the Commission's requirement that special access circuits be converted "without delay." In fact, most ILECs require negotiated due dates for EEL conversions. Indeed, even after SWBT modified its EEL conversion process in response to e.spire's complaint, it still requires that CLECs negotiate a due date for the EEL conversion project.[27] The Joint Commenters submit that CLECs generally have little negotiating leverage in such a situation, and therefore urge the Commission to adopt national EEL provisioning intervals.

---

[27] *See SWBT EEL Conversion Ex Parte.*

To ensure that those ILECs provision EEL conversions in a timely manner, and without delay as previously ordered by the Commission, the Joint Commenters urge the Commission to adopt special access conversion provisioning intervals. Noting that "timely provisioning of collocation space is essential to telecommunications carriers' ability to compete effectively in the markets for advanced services and other telecommunications services" the Commission has already established national rules implementing the collocation requirements of the 1996 Act would reduce barriers to entry and speed the development of competition."[28] Timely access to EELs is as important to the deployment of advanced services and other telecommunications services as collocation, and accordingly, the Commission should adopt a national provisioning interval in order to make EELs available to all data oriented and other advanced services providers. The Joint Commenters propose that the Commission find that special access is the retail analog for special access conversions, and require ILECs to comply with the metrics governing special access provisioning in the conversion of special access circuits to EELs. Likewise, ILECs must not be permitted to make any quality of service distinctions between EELs and special access.

Timely provisioning of EEL arrangements, whether they be new EELs or converted special access circuits, is critically important to a telecommunications carriers' ability to compete effectively in the markets for advanced services. Absent national standards, ILECs will continue to unreasonably delay the provisioning of new EELs and the conversion of special access circuits to EELs and accordingly, retard the ability of CLECs to compete with ILECs on a nondiscriminatory basis.

---

[28] *See Order on Reconsideration and Second FNPRM in CC Docket No. 98-147 and Fifth*

IV. ANY EEL RESTRICTIONS MUST BE NARROWLY TAILORED IN ORDER TO ALLOW DATA ORIENTED CARRIERS TO UTILIZE EELS WHILE SIMULTANEOUSLY PREVENTING ARBITRAGE IN THE CIRCUIT SWITCHED INTEREXCHANGE MARKET.

The temporary restrictions now governing EELs were originally adopted to address the concerns of ILECs, who asserted that allowing IXCs to convert special access circuits to UNEs to transport their interexchange switched voice traffic would lead to increases in ILEC's local rates and would undermine Universal Service support.[29] However, the ILECs subsequently misunderstood and misinterpreted the Commission's temporary EEL restrictions in a way that completely misapprehends the Commission's rules. The ILEC's tortured interpretation of the EEL exceptions swallows the rule.

That is, according to the ILECs, the temporary and limited restrictions adopted in the *Supplemental Order* and *Supplemental Order Clarification,* which merely sought to protect against EELs being used to carry circuit switched interexchange traffic and prevent IXCs from converting special access services to UNE combinations, were interpreted in such a way that the EEL restrictions set forth by the Commission *were the only available use of EELs*. The result has been that for the last year and a half, as a practical matter, EELs have been unavailable to data oriented carriers, even though the Commission's EEL restrictions never intended such a result. The Joint Commenters submit that the Commission must narrowly tailor any EEL use restrictions to clarify that such restrictions are meant to ensure that requesting carriers cannot use EELs solely for the transport and termination of interexchange switched voice traffic.

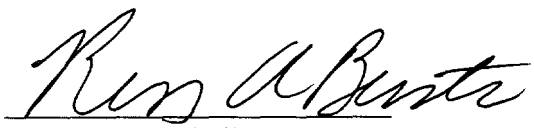
FMPRM in CC Docket No. 96-98, ¶ 17 (rel. Aug. 10, 2000)

[29] *See Supplemental Order*, ¶ 4.

V. CONCLUSION

By taking the steps outlined herein, the Commission will ensure that facilities based carriers have access to EELs in the manner which the Commission intended.

Respectfully submitted,

By: 

Brad E. Mutschelknaus
Jonathan E. Canis
Ross A. Buntrock
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600
(202) 955-9782 (fax)
rbuntrock@kelleydrye.com

Attorneys for the Joint Commenters

CERTIFICATE OF SERVICE

I hereby certify that I have hand-served a copy of the Joint Cbeyond Communications, Inc., e.spire Communications, Inc., KMC Telecom, NET2000 Communications Services, Inc., Winstar Communications, Inc. and XO Communications, Inc. upon all counsel of record as follows:

Office of the Secretary, FCC
445 12th Street, S.W.
Suite TW-A325
Washington, DC 20554

Janice Myles
Common Carrier Bureau Policy
and Program Planning Division
445 12th Street, S.W.
5-C327
Washington, DC 20554

Jodie Donovan-May
Common Carrier Bureau Policy
and Program Planning Division
445 12th Street, S.W.
5-C313
Washington, DC 20554

Tom Navin
Common Carrier Bureau Policy
and Program Planning Division
445 12th Street, S.W.
5-C142
Washington, DC 20554

International Transcription Service
445 12th Street, S.W.
Suite CY-B400
Washington, DC 20554

via Hand Delivery, on the 5th day of April 2001.

Margaret Lucero